IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOHNNY LACY,

Plaintiff,

v.

ORDER

12-cv-397-bbc

DR. SCOTT A. HOFTIEZER, JAMES GREER,
DR. DAVID BURNETT and DR. BURTON COX,

Defendants.

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Plaintiff Johnny Lacy, a prisoner at the Wisconsin Secure Program Facility, brought this civil action alleging that defendant prison officials have failed to treat his various severe medical problems since he was transferred to the prison. In a February 4, 2013 order, I granted defendants' motion for summary judgment in part, on exhaustion grounds (he is now proceeding only on claims regarding his diabetes, hepatitis C and severe pain) and denied plaintiff's motions for preliminary injunctive relief, appointment of counsel and appointment of an expert.

Plaintiff has responded by filing a motion he titles as a motion to amend or alter judgment under Fed. R. Civ. P. 59, but it is more appropriately characterized as a motion for reconsideration of the February 4 order under Fed. R. Civ. P. 54(b) because no judgment has issued in this case. Rule 54(b) provides that an interlocutory order may be revised at any time before the entry of a final judgment adjudicating all claims and all parties' rights and

liabilities. However, "[r]econsideration is not an appropriate forum for . . . arguing matters that could have been heard during the pendency of the previous motion." Ahmed v. Ashcroft, 388 F.3d 247, 249 (7th Cir. 2004). .

Plaintiff argues first that the court erred in not construing his complaint to include claims under Title II of the Americans with Disabilities Act. I will deny plaintiff's motion regarding this argument for several reasons. First, this issue has nothing to do with the court's February 4, 2013 order. Rather, plaintiff requests reconsideration of the court's August 31, 202 screening order, in which the court did not construe plaintiff's complaint as including such claims. Dkt. #4. Plaintiff has had ample chance to move for reconsideration of that order and it is too late into the proceedings for him to do so now, after the court has granted defendants' motion for partial summary judgment on exhaustion.

Even if I allowed plaintiff to move for reconsideration of the screening order, I would not allow him to proceed on ADA claims. First, Title II of the ADA states that "no qualified individual with a disability shall, by reasons of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity." 42 U.S.C. § 12132. To state a claim under the ADA, a plaintiff must identify (1) a "physical or mental impairment that substantially limits one or more major life activities," 42 U.S.C. § 12102(2)(A); (2) "the services, programs, or activities" of the prison that are being denied him because of his disability, 42 U.S.C. § 12132; and (3) the "reasonable accommodation" he is seeking that a particular defendant has refused to provide. 42 U.S.C. § 12131(2). According to the allegations in plaintiff's complaint, the only "services, programs, or

activities" he was denied was his medical care. However, a prison official does not violate the ADA when failing "to attend to the medical needs of . . . disabled prisoners." Bryant v. Madigan, 84 F.3d 246, 249 (7th Cir. 1996).

In his motion for reconsideration, plaintiff discusses several services he is being denied, most of them amounting to denial of medical care. He states also that prison staff has not made accommodations for exercise, but he did not identify this activity in the complaint, and even if he had, it is difficult to see how he could be able to proceed on this claim because he is barred from proceeding in forma pauperis on a claim unless the allegations supporting that claim suggest that he is in imminent danger of serious physical danger. Finally, plaintiff states that defendants have not fulfilled the "5381-practicum requirement" and that his "biggest disability is the incarceration." He provides no explanation of what he means on the first point, and as for the latter, the mere fact of plaintiff's incarceration is not a disability that the ADA makes actionable.

Finally, plaintiff argues that defendant Dr. Burton Cox lied about the kinds of treatment he provided and about plaintiff's history of hoarding methadone. However, Cox's truthfulness is the kind of factual matter that I may not consider at this point in the litigation. Townsend v. Fuchs, 522 F.3d 765, 774-75 (7th Cir. 2008) (credibility determinations are for the factfinder to make, not for the court at the summary judgment stage). At present, plaintiff has presented nothing indicating that I was incorrect in granting partial summary judgment to defendants on exhaustion grounds or in denying plaintiff's various motions.

ORDER

IT IS ORDERED that plaintiff Johnny Lacy's motion for reconsideration, dkt. #35, is DENIED.

Entered this 8th day of May, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge